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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 06 2007

SRC 05 198 52026

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner initially sought employment as a research associate and is now working as a senior scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, while the record before the director was not particularly persuasive, the evidence submitted on appeal, relating to the petitioner's accomplishments prior to the filing of the petition, overcomes the director's valid concerns.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability and as an advanced degree professional. The petitioner holds a Ph.D. from the Mie University School of Medicine. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. Thus, whether the petitioner may also qualify as an alien of exceptional ability is moot. The remaining issue

is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, medical research, and that the proposed benefits of his work, improved treatment of heart failure, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Initially, counsel relies on a nonprecedent decision from this office for the proposition that a petitioner need only demonstrate that the alien's contributions "have been especially valuable." Unlike precedent decisions, nonprecedent decisions are not binding and are not written with the intention of articulating

binding standards. 8 C.F.R. § 103.3(c). Far more useful is the language in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner received his medical degree from China Medical University in 1992 and subsequently worked as a resident in China through 1994. The petitioner then began his graduate studies at the Mie University School of Medicine in Japan, where he received his Ph.D. in 2000. The petitioner then accepted a postdoctoral research associate position at the University of Louisville. Around the date of filing, the petitioner began working as a senior scientist at Novartis Institutes for BioMedical Research (Novartis). The petitioner must establish his eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). As most, if not all, of the petitioner's work for Novartis postdates the filing of the appeal, we cannot consider that work in this matter. Moreover, any assertions that the petitioner is vital to projects at the University of Louisville are no longer valid as the petitioner has left his position at that institution. Nevertheless, we will consider whether the petitioner has such a track record of success with a degree of influence on the field as a whole that the national benefit of his employment at Novartis is more than mere speculation.

Dr. [redacted], an Emeritus Professor at the Mie University School of Medicine, discusses the petitioner's development of a rat model for lung transplants. Dr. [redacted] explains that the success of lung transplants is "limited by the high incidence of acute and chronic graft rejection." Dr. [redacted] asserts that lung transplantation in a rat involves technically difficult microsurgery, but also states that it is a "well-known experimental procedure to investigate this disease." According to Dr. [redacted] the petitioner's model involved a short operation time, yielding a decline on postoperative complications and mortality. Finally, Dr. [redacted] asserts that the petitioner's mix of skills and knowledge are rare; Dr. [redacted] has been forced to terminate projects because has been unable to replace the petitioner.

While at the University of Louisville, the petitioner worked in the laboratory of Dr. [redacted] Dr. [redacted] discusses five contributions by the petitioner in addition to the work discussed by Dr. [redacted]. First, the petitioner developed mouse models of human heart failure: ischemic heart failure after myocardial infarction and pressure-overloaded left ventricular hypertrophy. The petitioner also developed neurohormonal models of left ventricular hypertrophy. Dr. [redacted] asserts that these models have formed the bases of grants obtained by Dr. [redacted] laboratory.

Second, the petitioner "refined important techniques" for the evaluation of cardiac function in mice and rats after genetic manipulations. Such evaluation is complicated by the small size of mice and rats. The addition of the petitioner to Dr. [redacted] laboratory has allowed Dr. [redacted] to include mice and rats in projects that previously involved larger animals. Dr. [redacted] asserts:

> First, the overall number of American graduates pursuing careers in science has decreased. Second, as more and more cardiovascular researchers focus on molecular biology, genetic manipulation, and biotechnology, there has been a reduction in the number of whole animal physiologists, although this group remains central to understanding the systemic effects of pathological perturbations. As there are fewer talented American graduates capable of performing sophisticated integrative cardiac physiology research, the importance of foreign-born researchers in moving science forward has increased.

Both Dr. [redacted] and Dr. [redacted] assert at length that the national interest waiver is warranted because the petitioner has unique skills in the field. It cannot suffice, however, to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. As stated above, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221. While counsel has asserted that researchers of the highest quality are needed in the United States, it is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization, such as scientific researchers. *Id.* at 217. That said, the record contains additional information appropriate for consideration.

In his third project at the University of Louisville, the petitioner was involved in an "ongoing" project funded by a multidisciplinary Program Project Grant from the National Institutes of Health (NIH), to investigate the cardiovascular effects of aldehydes, a pollutant. Dr. [redacted] asserts that the petitioner is critical for evaluating the mechanistic basis for the association between aldehydes and cardiomyopathy. As stated above, however, the petitioner has left the University of Louisville. As such, any assertions that the national interest waiver is warranted to allow the petitioner to complete a project at this university fail.

Fourth, the petitioner investigated the role of the beta-adrenergic receptor (β-AR) and oxidative stress in the heart. The petitioner showed that sustained activation of β-AR alters a fundamental

physiologic phenomenon in the heart, that β-AR activation reduces levels of a critical antioxidant and that administration of an oxygen free radical scavenger during β-AR activation prevents the development of cardiac hypertrophy and dysfunction. This work has therapeutic implications and, as demonstrated on appeal, is the most cited of the petitioner's work.

Finally, the petitioner demonstrated that three select proteins, HO-1, iNOS and ecSOD are not only cardioprotective during the early stages of a heart attack, but have previously unappreciated benefits during chronic heart failure. Specifically, the petitioner demonstrated that upregulation of HO-1 in the failing heart is beneficial, counteracting dysfunction, hypertrophy, oxidative stress and inflammatory activation. This work won an American Heart Association Scientific Sessions Poster Prize in 2004.

Initially, the petitioner submitted several other letters from faculty at the University of Louisville providing similar information. The petitioner also submitted 10 published articles and 16 abstracts. In response to the director's request for additional evidence, the petitioner submitted three additional letters. Dr. [redacted] an associate professor at Harvard Medical School, asserts that he became aware of the petitioner's work at the 2004 conference and has followed the petitioner's work since that time. Dr. [redacted] discusses the unique nature of the petitioner's skills and their importance to the study of heart failure. Dr. [redacted], an Emeritus Professor at the Keio University School of Medicine, also praises the petitioner's unique skills at microsurgery. Finally, the petitioner submitted a letter from Dr. [redacted], Head of Heart Failure at Novartis. Dr. [redacted] asserts that the petitioner is now participating in Novartis' drug discovery efforts using his techniques for evaluating heart function in mice and rats.

In response to the director's request for additional evidence of the petitioner's influence in the field, counsel asserted that the petitioner had been "extensively and frequently cited." More specifically, counsel asserted that three of the petitioner's article had been cited "numerous times by independent researchers." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The only evidence supporting this assertion prior to appeal was a self-serving list of citations within the petitioner's curriculum vitae.

On appeal, the petitioner submitted the actual articles citing his work. While the citations do not rise to the level claimed by counsel, they demonstrate some recognition of the petitioner's work in the field. Moreover, the petitioner submits a new and persuasive letter from Dr. [redacted] Specifically, Dr. [redacted] asserts that a representative from Novartis was at the 2004 AHA conference and was sufficiently impressed with the petitioner's award-winning poster presentation as to initiate negotiations to hire the petitioner for drug development initiatives at Novartis. This information persuasively demonstrates the significance of the petitioner's work presented at that conference. The petitioner also submitted a stronger letter from Dr. [redacted], asserting that his laboratory looks to the petitioner's work while developing microsurgery techniques. This new evidence submitted on appeal significantly adds to the record that was before the director.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the cardiology community recognizes the significance of this petitioner's research rather than simply the general *area* of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the alien employment certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.